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**In The Supreme Court
of the
State of Utah**

CARBON MOTORWAY, INC.,

Plaintiff,

—vs.—

**PUBLIC SERVICE COMMISSION
OF UTAH and HAL S. BENNETT,
DONALD HACKING and JESSE
R. S. BUDGE, Commissioners of the
Public Service Commission of Utah,
and BARTON TRUCK LINE, INC.,
BEEHIVE MOTOR LINES, and
WYCOFF COMPANY, INC.,**

Defendants.

FILED

NOV 20 1962

Clerk, Supreme Court, Utah

**BRIEF OF PLAINTIFF
CARBON MOTORWAY, INC.**

**APPEAL FROM ORDER OF THE
PUBLIC SERVICE COMMISSION OF UTAH**

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Defendants.

Case No. 9716

**BRIEF OF PLAINTIFF
CARBON MOTORWAY, INC.**

STATEMENT OF THE KIND OF CASE

This is an appeal from an order of the Public Service Commission of Utah denying the application of Carbon Motorway, Inc. for a Certificate of Convenience and Necessity, authorizing transportation of general commodities, with exceptions, between Salt Lake City, Brigham City, Utah and the Thiokol Chemical Corporation plant site area.

DISPOSITION OF CASE BEFORE THE PUBLIC SERVICE COMMISSION

Wasatch Fast Freight Division of Consolidated Freightways (herein called Wasatch) filed application with the Public Service Commission of Utah (herein called Commission) to abandon its intrastate operations between Salt Lake City and the Utah-Idaho border. Four applications covering all or part of the area were thereafter filed as follows:

Barton Truck Line, Inc., Case No. 4009-Sub 7; Beehive Motor Lines, Case No. 5102; Carbon Motorway, Inc., Case No. 3815-Sub 8; and Wycoff Company, Incorporated, Case No. 4252-Sub 10. Carriers will hereinafter be referred to as Barton, Beehive, Carbon and Wycoff. Hearings were held on each application on consecutive days and in the order noted. The consolidated report of the Commission, issued May 14, 1952, granted authority to Barton and denied the applications of the other three carriers. This appeal relates to denial of the application of Carbon.

RELIEF SOUGHT ON APPEAL

Carbon seeks reversal of the Commission order denying its application and an order of this Court directing the Commission to enter its order granting the application.

STATEMENT OF FACTS

In early 1962, the Wasatch Fast Freight Division of Consolidated Freightways filed its application to abandon intrastate operations between Salt Lake City, Utah and the Utah-Idaho line. It operated basically as a regular route common motor carrier, transporting general commodities along principal highways, as well as points within ten miles thereof. Following this action, general commodity applications were filed with the Commission by three carriers and one new non-carrier corporation as follows:

(a) Case No. 4009-Sub 7. Barton applied for authority similar to that of Wasatch between Ogden and the Utah-Idaho line. It then held authority between Salt Lake City and Ogden, and its application also sought authority to serve points within ten miles of the Salt Lake City-Ogden highway, and explosives.

(b) Case No. 5102. Beehive applied for authority between Salt Lake City and the Utah-Idaho line identical with that of Wasatch.

(c) Case No. 3815-Sub 8. Carbon applied for authority identical with that of Wasatch between Salt Lake City and Brigham City, Utah, and the Thiokol Chemical Corporation Plant and Air Force Plant No. 78 to the west of Brigham. It then held basic authority along U.S. Highway 50 between the Colorado-Utah line and Salt Lake City, through Green River, Price and Provo, as well as to Payson, in Emery County and other Utah points (see R. 1193).

final Wycoff hearing, the Commission "of its own motion and upon motion of Mr. Richards" (attorney for Beehive) granted "the consolidation of all these cases, the records in all cases in a determination of the various applications" (R. 1037).

The evidence of the Carbon hearing was based upon three main premises:

(a) That the application fulfilled a shipper need by instituting service between Salt Lake City and Brigham City which, if coupled with a grant to Barton of its application to northern Utah points in addition to its present Salt Lake to Ogden authority, would provide a service to fill the gap left by the abandonment of Wasatch.

(b) That its area of application, coupled with that of Utah County and other points served, would provide a needed and non-existing single line service through the industrial heart of Utah, without the necessity of interline at Salt Lake City.

(c) That such grant would not seriously affect Barton, the only regular route motor carrier between Salt Lake City and Ogden, and would materially strengthen the operations of Carbon which had been adversely affected by the decline of traffic in the Carbon and Emery Counties areas.

Mr. Charles Hollingworth, President and General Manager of Carbon, described its present and proposed

operations (R. 499). It operates as a general commodity carrier between the Colorado-Utah line and Salt Lake City via U.S. Highway 50, serving also points in Emery County and the Price area as indicated (Ex. 1). It maintains an extensive list of operating equipment (Ex. 3) with terminals at Salt Lake City, Provo and Price, and an agency at Green River (Ex. 5 and 6). Within the area, it operates numerous schedules between Salt Lake City and other points on a daily basis (Ex. 7). Its terminals are connected by telephone and teletype, and it has full time solicitors, including an off-line solicitor serving Ogden, Utah. While it has sustained losses in the past few years, Exhibit 10, its balance sheet shows that it is possessed of substantial assets and has the basic financial ability to conduct proposed operations (Ex. 9).

Mr. Hollingworth discussed the operations which would be conducted on a coordinated basis in the event of a grant of authority. Carbon would establish a terminal at Ogden (R. 505), and proposed daily service between Salt Lake City, Brigham and points to be served, including the government complex at Thiokol Chemical Plant. He pointed out that the main Salt Lake City terminal could handle the additional traffic and operation without the necessity of adding new personnel, terminal facilities or equipment (R. 510-517). Exhibit 8 was the proposed minimum schedules between Salt Lake City and application points involved, directly coordinated with

the schedules at Salt Lake City arriving and departing from points south. As a result, he anticipated the elimination of delay in interline at Salt Lake City on traffic moving between the new area and that of present service (R. 776). Double bottom trailers would be used. On ltl, pickups and delivery on the north zone would move through Salt Lake for pickup and delivery in the south zone on one trailer, and local Salt Lake deliveries or pickup would be made by the other. Much of the traffic would move directly, for example, from Provo to Ogden. He stated that not only would this eliminate delay, it would avoid operational problems relating to tracing shipments, claims, etc.

To illustrate the financial effect of its combined operations, Carbon offered Exhibit 11. This is a detailed analysis in which income and expense for 1961 are projected to show the additional revenue and expense arising from the combined operations, and resultant savings. Figures are presented in careful detail, and include an analysis of each of the various terminal operations. The net result shows that a Carbon operating loss in 1961 would have been converted to a profit under the combined operations. The exhibit was summarily rejected by the Commission (R. 529).

Numerous witnesses appeared in support of the application as follows:

Dr. Osmond L. Harline, Director, Bureau of Econo-

mic and Business Research, University of Utah (R. 713) testified as to the economics of the Wasatch Front, extending from Spanish Fork on the south to Brigham on the north. He introduced Exhibits 12 and 13, which consider in detail the startling industrial and population growth which has occurred in the Front in the past decade. Such growth commenced during World War II and continued at an accelerating pace through the period 1950 to 1960, and subsequently. His statistical studies were amplified by his testimony. He pointed out that between 1950 and 1960, in the Wasatch Front there was an increase of over 200,000 people (R. 718), that agricultural employment declined while manufacturing employment increased (R. 719). Thus, in manufacturing, Davis County increased 263%, Salt Lake County 67%, Utah County 37%, Weber County 89% and Cache County 140%. The growth was projected through 1980, and in part based upon a study for the Bureau of Public Roads and Utah State Road Commission. He felt such growth would be slightly less than that which had occurred in the postwar period in the Wasatch Front (R. 726).

A condensation of the testimony of the shippers who appeared in support of the Carbon application is as follows:

Western Powder Company (R. 534) of Salt Lake City has magazines at this City and North Salt Lake. It has a substantial ltl movement of explosives from these

points to Utah generally. It has used Wasatch and Barton (R. 536), has not used Wycoff to any extent, and finds rail service unsatisfactory except for emergencies because of delay and need for prior notification. Ashworth and Salt Lake Transportation are not available for small movements as they have a stated minimum rate of 4,000 pounds. It supports the Carbon application as it feels the necessity of more than one carrier between Salt Lake City and Ogden.

Gould National Batteries of Ogden, manufactures and ships batteries throughout Utah (R. 666). The business is seasonal, but shipments would average three times a week into Utah County and two times to Carbon on ltl. In addition, there are truck load movements averaging one a week to Utah County. Salt Lake shipping ranges from 60,000 to 160,000 pounds a month, and the company has used both Barton and Wasatch. The statement of its witness in speaking of the Carbon application reflects that of other witnesses (R. 669):

“First off I believe there should be two carriers between Salt Lake and Ogden, because it historically results in better service, which we are primarily interested in.

“Secondly, we have had a critical problem with points south of Salt Lake City in that all of our shipments are interlined at that point, and we have lost at least one day, and up to three days in Salt Lake for shipments going south on an interline, regardless of which carrier they inter-

line with, and, of course, in trying to check this out and find out why, it is very difficult to do so. One carrier blames the other, and that is the situation."

Proudfit Sporting Goods Company of Ogden distributes sporting goods and allied lines throughout Utah (R. 690). It has at least ten shipments a week moving to Salt Lake City (R. 691) and its business is seasonal. It also ships into such points as Utah County and the Price area (R. 691). The witness objected to the 24 hour delay for anything going south of Salt Lake as a result of interline. He pointed out that the Company has five competitors in Salt Lake City and that the interline transportation delay has severely handicapped the business. As he stated (R. 692):

"I will tell you, Commissioner, for thirty years they (referring to Salt Lake City competitors) have certainly been preferred by whoever set up the truck gateway."

The witness further explained the problem of any distributor with small dealers (R. 692):

"Let me explain, in our business there is a myriad of variety. For example, you have a kid who wants a bicycle. You know that there are over 1,000 standard models and colors in the bicycle we sell? Now, there isn't a single store in the United States that has them all on hand. In other words, we act as a warehouse for the small dealers all over the area, and a great many of our shipments are wanted in a terrific hurry."

Again (R. 693):

“Q. Now, then, I take it that you seek a single line carrier from Ogden into Utah County and Price points?”

A. That’s right, this 24 hour delay is very important to us.”

The witness illustrated the volume growth (R. 695):

“Q. What is your volume?”

A. Our volume is now almost 10 times what it was before the war.”

George Lowe Hardware Company of Ogden, Utah, is a general hardware and sporting goods distributor (R. 701). It has shipments to all areas involved and has been forced to use its own truck into Salt Lake City by its competitors (R. 702). Shipments move to Utah and Carbon Counties daily in competition with Salt Lake City suppliers. Its concern with interline delay is evidenced at R. 703:

“A. That’s right. We are in the same position Mr. Proudfit is in that testified before me.

“As he mentioned, there has been a hassle for many years on this delay in connecting carrier in Salt Lake. Now, that isn’t just our statement, that is the statements we get from the customers down at Price and Provo and Spanish Fork and — oh, all the way down in Utah.”

Bonham Corporation of Provo manufactures motor scooters and sports goods (R. 744). It has dealers in Ogden, Salt Lake and Brigham and is concerned with this area in shipments from Provo. The witness also referred to the importance of time in transit and the necessity of providing goods to a dealer who does not want to tie up capital in inventory (R. 746). This company supports Carbon and desires direct line service, objecting to the same interline delay.

Spanish Fork Foundry Corporation of Spanish Fork manufactures cast iron products which are sold primarily to cities (R. 757). It ships products from the foundry to points between Salt Lake City and Brigham about twice a week during the summer, totalling one to three tons a week (R. 759). Most of them go to one point in either Ogden or Brigham, but there are other intermediate shipments. The witness stressed the time in transit to these areas, and objected to the present interline at Salt Lake City where there may be lay overs as high as 48 hours (R. 761).

Backman Foundry of Provo, Utah casts a wide variety of products (R. 767). Shipments move from the foundry to the area between Salt Lake City and Brigham one to three times a week, to different job sites such as sewage disposal plants, water treatments plants, etc. The witness evidenced a concern with delay (R. 769):

“But I think the distance Provo and Ogden, a distance of 80 or 85 miles, it should be a direct shipment and not two carriers. Then it is very hard to trace two carriers to find out who is to blame when a shipment is misplaced, and why it hasn’t arrived.”

Again, R. 773, speaking of complaints:

“A. No, I have run down some of them, yes. One of our main, I would say that has given us more complaints than any, was General Machine in Ogden. We have trouble with their castings all the time. In other words, you just take some times, like I say, 4 or 5 days to get a shipment from Provo into General Machines in Ogden.”

When asked about the Carbon proposed single line service, the witness compared the type of service now available with that received from other carriers, R. 774:

“A. I wouldn’t know. I don’t know anything about the freight business, but I do know we can load Garrett and get 24 hour delivery or next-day delivery into Pocatello, Idaho, and I can’t see why Carbon couldn’t take it to Provo and get next day delivery in Ogden or between those points.”

Wheeler Machinery Company of Salt Lake City (R. 547) is a caterpillar distributor-dealer and has daily movements of parts and supplies throughout Utah, including the area involved (R. 548). It has used Wasatch daily and Barton once or twice a week, and while it uses

rail for complete tractors, such service is not satisfactory on smaller parts. It has movements from its Salt Lake City docks daily, both south to the Carbon area and north to the area of application. The witness stated it supported the Carbon application and prefers a single carrier which will solve its problems of dock congestion at time of pickup (R. 557).

Air Conditioning, Inc. conducts a heating and air conditioning equipment business (R. 562) and ships about 10,000 to 12,000 pounds each month to Ogden, with other shipments to job sites in the area, including Brigham. Time in transit and available transportation is important because of the necessity of scheduling material arrival at the job with the labor crews (R. 563). It has used Wasatch Fast Freight about 90% of the time, Barton about 10%, and has preferred Wasatch because of its superior service (R. 565). It supports the application as it feels two lines should serve the area (R. 567) and would be fully justified by the population and freight moving there. Carrier transportation is vital as many distributors are able to operate their own equipment, and if it cannot have adequate transportation service, it must operate at a competitive disadvantage (R. 567).

Carpenter Paper Company of Salt Lake City (R. 578) also has sales offices in Ogden, and is engaged in the sale and distribution of paper products of all kinds. It ships approximately 10,000 pounds a day to Ogden,

uses its own trucks for part of such shipments and common carriers four or five times a week. It has used Wasatch about 95% of the time and supports Carbon because of experience with its service. The witness pointed out the dock congestion problem at Salt Lake City (R. 585):

“We do have a problem on our dock of trucks loading out. They load out particularly from 3:00 o’clock until 5. The fewer trucks we have in there, the more we can put in one truck, the better off we are. It just seems good practice to have a few trucks, few haulers as possible, coming into our docks to pick up freight.

“If one truck could pick up for the south and north at the same time, it would eliminate a lot of confusion and congestion, particularly at our dock.”

Pacific Metals Company, Ltd. of Salt Lake City, Utah (R. 595) deals in various refrigeration and air conditioning equipment supplies, and non-ferrous metals. It ships into the northern area as well as to the south (R. 596). Between May and September it ships between 30,000 and 50,000 pounds a month to Ogden with about a third of that amount to Brigham (R. 596). It has used Barton and Wasatch to the north and on rare occasions the railroad (R. 597). It has found the Carbon service to the south fine. It supports the application as it will give needed additional service to replace Was-

atch, and objects to being confined to a single carrier (R. 600) between Salt Lake City and Ogden.

Lyon Coal Corporation of Ogden, Utah, operates a coal mine near Price (R. 607), and procures some of its operating equipment and supplies from Ogden, which are shipped to the mine. It has used Wasatch basically in connection with a Carbon interline at Salt Lake City (R. 611). The witness objects to delay and 2 day service from Ogden to the mine. He stated that he had been compelled to do local buying in Price which he would prefer to do elsewhere, and has been compelled to have parts fabricated at a higher cost in the Price area. He pointed out that if a single line service were available without the present interline delay at Salt Lake City, he would buy more of his supplies in Ogden and would much prefer to do so because his office is located at that point (R. 613).

Framm Filter Corporation of Brigham City (R. 617) distributes oil filters and cartridges throughout Utah from its plant (R. 618). It ships about 50,000 to 60,000 pounds a month into Utah County, and the interline at Salt Lake City has not been satisfactory. It needs a single carrier haul (R. 620). In addition, a prime concern is to acquire a service to replace that provided by Wasatch (R. 623).

Smedley's, Inc. of Layton, Utah, conducts a plumbing

and heating construction business. A basic concern relates to movement of pipe from Pacific States Cast Iron Pipe Company near Provo (R. 628). Some is shipped by Pacific trucks, but occasional urgent items require common carrier service. Although shipments are not frequent, it needs direct service, possibly one day, rather than the 2 or 3 days required by interline at Salt Lake or Ogden (R. 631). Again, this witness objects to having available only one carrier between Salt Lake City and Ogden (R. 631).

Shupe-Williams Candy Company, Ogden (R. 635). This Company manufactures and sells candy throughout Utah. It has used Wasatch and Barton about equally (R. 642). It objects to rail service to Salt Lake City because of delays for as high as 4 days (R. 645). It uses its trucks for some shipments into both Salt Lake and Carbon County points, but also uses common carriers, particularly during peak seasons (R. 637). Its shipments to Carbon County by common carrier reach 10,000 pounds a month during the rush season. It has been required to transport much of its merchandise to Salt Lake by its own trucks in order to compete, because of the increased charges resulting from an interline movement (R. 638). It desires a single carrier service to Utah County and the Price area.

Cornwall Warehouse Company of Salt Lake City conducts a general merchandise storage and distribution

business. It moves to northern points 50 to 75 shipments per day for a total of about 10,000 pounds (R. 650) and has used Wasatch 80% and Barton 3% of the time, the balance moving by rail (R. 651). The witness described dock loading problems similar to those of other witnesses, and stated that to avoid congestion they have been compelled to transport on their own trucks to the carrier's docks at Salt Lake City.

Testimony of interested carriers was introduced. By stipulation of Carbon, the operating testimony of Ashworth and Salt Lake Transfer was, in the interests of time, stipulated from the Barton and Beehive hearings. These carriers are typical heavy hauling carriers, and operate an on-call service with headquarters, as pertinent here, at Salt Lake City. Their tariff provisions provide for a stated minimum, which in the evidence was described as 4,000 to 8,000 pounds, although Carbon believes the latter figure to be correct. In short, they are not practically available for ltl traffic, and, since they do not operate regular schedules, do not provide the type of carrier service here involved. Moreover, it appears from their appeal brief that their concern is limited to the transportation of explosives.

W. S. Hatch & Company is also a special carrier operating on-call service in truckload lots, and limited to commodities in bulk.

The operating witness of Barton testified as to its regular route operations, stating that it is providing daily service between Salt Lake City and Ogden (R. 841). His testimony was exceedingly brief. He stated generally that the operation had recently become compensatory (R. 842), but supplied no supporting data. As to the impact of grant of additional carrier authority, the witness in broad terms stated that any additional carrier would have some adverse effect upon Barton.

On May 14, 1962, the Commission issued its consolidated report, granting the Barton application and denying all others. Petition for Rehearing and Reconsideration was filed by Carbon within time, and denied by the Commission on June 12, 1962.

STATEMENT OF POINTS

POINT I

THE ORDER OF THE COMMISSION IN CONSOLIDATING ALL FOUR PROCEEDINGS AT THEIR CONCLUSION, AFTER CONDUCTING EACH HEARING ON THE PREMISE OF UNRELATED DETERMINATION AND RESTRICTING THE RIGHT OF CROSS-EXAMINATION IN EACH, WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW, AND PREJUDICIALLY DEPRIVED PLAINTIFF OF DUE PROCESS OF LAW.

POINT II

THE ORDER OF THE COMMISSION IN DENYING APPLICATION OF CARBON MOTORWAY, INC. WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO THE EVIDENCE AND LAW.

POINT III

THE ORDER OF THE COMMISSION DENYING ADMISSION OF EXHIBIT 11 OF CARBON MOTORWAY, INC. WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW.

ARGUMENT

POINT I

THE ORDER OF THE COMMISSION IN CONSOLIDATING ALL FOUR PROCEEDINGS AT THEIR CONCLUSION, AFTER CONDUCTING EACH HEARING ON THE PREMISE OF UNRELATED DETERMINATION AND RESTRICTING THE RIGHT OF CROSS-EXAMINATION IN EACH, WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW, AND PREJUDICIALLY DEPRIVED PLAINTIFF OF DUE PROCESS OF LAW.

Upon the abandonment of the Wasatch operations, the issue before the Commission on the four applications was to determine the manner in which a replacement carrier service would be provided. It is logical to assume that a determination would best be based upon a consideration of the entire proceedings, and a comparison

of the four applications. For this reason, Carbon moved for consolidation almost a month prior to the commencement of hearings. The motion was denied, and the chronology of events thereafter has been set forth in the statement of facts.

Throughout the hearings, the Commission limited each hearing to the area and specific limits of the application before it, excluding all other considerations. It not only denied the right of cross-examination, but by its actions precluded the admission of testimony which would otherwise have been introduced. At the conclusion of applicant's testimony in the last of the four hearings and in a complete reversal of position, the Commission summarily and over objection consolidated the records of all hearings as a basis of its determination. Prior hearings had been concluded, and interested carriers were powerless to correct the records.

Objection is not made to the simple fact of consolidation, had it been done at the outset. Under its broad powers, at that time the Commission had the authority and should logically have done so. The objection lies to the manner in which this was done, the utter disregard of orderly procedure with resultant confusion, and the prejudicial destruction of obvious rights of the parties.

Plaintiff is mindful of the numerous cases supporting the rule that administrative agencies in conducting hearings in the exercise of quasi-judicial functions are not

held to strict conformity with the judicial procedure required in a court of law, and that a hearing may be fair even though such procedures are not rigidly followed. While it is difficult to draw the line, it is obvious that the rule cannot be accepted as a blanket excuse for the wilful disregard of fundamental procedures and destruction of basic rights which are protected by due process of law. As stated in 2 Am. Jur. 2d 234:

“The right to cross-examine witnesses in quasi-judicial or adjudicatory proceedings is a right of fundamental importance which, in regard to serious matters, exists even in the absence of express statutory provision, as a requirement of due process of law.”

In *Southern Stevedoring Co. v. Voris*, 190 F. 2d 275 (CCA 5, 1951) after pointing out that the administrative body was not bound by common law or statutory rules of evidence or technical or formal rules of procedure, the Court stated:

“But this general provision does not, indeed it could not, dispense with a right so fundamental in Anglo-Saxon law as the right of cross-examination. Although administrative agencies may be relieved from observance of strict common law rules of evidence, their hearing must be still conducted consistently with fundamental principles which inhere in due process of law.”

This Court has itself recognized these principles. It has refused to give the Commission carte blanche

authority to conduct its hearings in any manner it desires. Thus, in *Morris v. Public Service Commission*, 7 Utah 2nd 167, 321 P. 2d 644 (1958), the Court considered the act of the Commission in cancelling a Certificate in a proceeding where the only issue was as to its transfer. There, page 464, the Court quoted with approval from its earlier decision in *Los Angeles and Salt Lake Railroad Company vs. Public Utilities Commission*:

“ ‘Commissioners cannot act on their own information. Their findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such.’ ”

The Barton application related to points north of Ogden, as it possessed authority from Salt Lake City to Ogden. The testimony, however, properly included shipper comments as to experience with the Barton service between Salt Lake City and Ogden which gave a general impression that the witness was satisfied with service in the area. Cross-examination was attempted to determine whether this satisfaction in fact existed, particularly as to whether a single line service serving the Wasatch Front was desired, and also to show a comparison of the Carbon and Barton service. Carbon

was not allowed to pursue this area of examination, since the Commission was then following the theory that the only issue involved was service north of Ogden. When the Carbon application was heard, it presented its case upon the assumption that the testimony of the witnesses in the Barton and Beehive applications could not be used in the Carbon case. There was, therefore, no need to recall the Barton and Beehive witnesses. After the Carbon case had been concluded, the entire record including the testimony of the Barton and Beehive witnesses was made a part of the Carbon application, and it meant that conclusions could be drawn from testimony which had not been subject to appropriate cross-examination. The denial of the right of cross-examination and violation of the necessary assumption by Carbon in its case that evidence from other cases would not be applicable, deprived it of basic rights and due process of law.

There is no question but that orderly procedures have been ignored. For example, in the Barton application, Mr. Glen Hatch of Redman Van & Storage Company had testified as to the shipping requirements of this company (R. 56). He had described traffic movements in northern Utah. Carbon on cross-examination attempted to determine his views as to the standards of Carbon service, as well as movements between the north-south areas. Not only were the answers as to Carbon service stricken (R. 67), but it was prevented from further ques-

tioning. Rodney Ashby testified in the Barton proceeding with reference to shipments in connection with the school lunch program. The testimony on direct examination had been restricted to points north of Ogden, being those involved in the Barton application. Carbon on cross-examination attempted to determine the needs of the shipper for a single pickup at its Salt Lake warehouse for distribution to points both north and south of Salt Lake, but was emphatically denied the right to pursue this cross-examination. Here is the record (T. 86):

“Com. Budge: Well, then, Mr. Worsley, right there it seems to me that you are trying to produce a situation where you want the Commission to have evidence here of the comparative values of your service and this Applicant’s.

Mr. Worsley: Why shouldn’t they have it?

Com. Budge: Because it isn’t in this hearing. This hearing relates to the application here. You’ll have a chance to put yours in when your case is called.

Mr. Worsley: Well,

Com. Budge continuing: But we don’t want to try your case here.

Mr. Miner: If the Commission please, may I interrupt.

Mr. Worsley: No, you may not. Your prob-

lem, as a Commission, is to determine what ought to be done.

Com. Budge: *Not here, not as between these carriers here.*

* * *

Com. Budge: Of course, you are trying to consolidate the cases, which the Commission has ruled can't be done.

* * *

Com. Budge: No, I think you can't try your case here, Mr. Worsley, and the Commission isn't supposed, in this hearing, to compare the relative values of the services of the different parties."

Finally, it should be noted that at page 4 of the report of the Commission, it indicates that the consolidation was made as a result of stipulation of all parties (R. 1153). It is difficult to understand the source of this conclusion, as it is not in conformity with the record. At R. 1035, Wycoff hearing, the attorney for Beehive moved that the entire record in all four cases be considered jointly by the Commission in making its determination. Carbon had previously objected and renewed the objections, stating its reasons for so doing (R. 1036). Lake Shore Motor Coach Lines, Inc., a Wycoff protestant which had not appeared in the prior hearings, objected. The Commission then stated that upon its own motion and motion of Mr. Richards (attorney for Beehive), the records were consolidated "in a determination" of the various applications.

POINT II

THE ORDER OF THE COMMISSION IN DENYING APPLICATION OF CARBON MOTORWAY, INC. WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO THE EVIDENCE AND LAW.

In considering the question as to whether or not the Carbon application should have been granted, the theory of that application is pertinent. Wasatch abandoned operations from Ogden to the Idaho line. This left a serious deficiency in the motor carrier service available to the public, and there never has been any question but that some additional service was required. Barton was serving between Salt Lake and Ogden, and generally its application sought to extend its operations from Ogden north, and to expand its authority between Ogden and Salt Lake City to include points within 10 miles of the highway, and to add authority to transport explosives. There had been two carriers serving the populated and highly industrialized area between Salt Lake and Ogden. Beehive, not an existing carrier but a corporation newly organized, applied for the entire area and was obviously possessed of limited financial abilities and operating experience. Wycoff applied for the entire area in what it vaguely described as "express service". It therefore seemed logical that solution lay in granting the application of Carbon from Salt Lake City north to Brigham, serving Thiokol and the Air Force Plant, which would restore, in connection with Barton, the Wasatch service available to the shipping public.

At the same time, a problem which has plagued the shipping public for many years would be solved and a single line carrier established throughout the industrialized area of northern Utah, particularly between Utah, Salt Lake, Davis and Weber Counties. Obviously the extension to the Brigham-Thiokol area was to carry out the concept, and was made because of the activity in quasi-governmental military installations in the area. There was an additional benefit, in that the coordination of the operation from Salt Lake City to Brigham with that of the present Carbon operations would result in the stronger financial position of Carbon, and would remove a loss operation resulting in substantial measure from the decline in industrial activity in Carbon County and eastern points served.

Consistent with the above, Carbon caused an exhaustive economic study to be prepared by Dr. Osmond Harline, Director of the Bureau of Economic and Business Research of the University of Utah (R. 713). This study showed an industrial and population growth of a startling extent in the Wasatch Front, more than a casual consideration would indicate. It was based upon the assumption that increases in population and industry are accompanied inevitably by an increased demand for public transportation. Exhibit 17 is a summation of authorized carriers in the area involved. Historically there have been two services available, in addition to the Union Pacific Railroad and its auxiliary service, the Union

Pacific Motor Freight, between Ogden and Salt Lake City.

The testimony of the shipper witnesses has been set forth in detail in the Statement of Facts. From such testimony, it is clear that the shipping public has long had a serious problem arising from the necessity of interline between carriers at Salt Lake City for movements in the Wasatch Front. The shippers complained bitterly as to the problems generated, and the unnecessary interline delay ranging from one to several days. This situation has worked a needless and inequitable hardship on many businesses north of Salt Lake City, particularly in the Ogden area. Such companies as Proudfit Sporting Goods (R. 690) and George Lowe Hardware Company (R. 701) are distributing from Ogden throughout Utah in direct competition with Salt Lake City distributors. Inadequate transportation has handicapped them in their competition with Salt Lake City distributors, and in some instances has compelled the use of their own trucks between Salt Lake City and Ogden. There is not only no need to compel individual shippers to go to this extreme, but much traffic is involved which is not now being served by any common carrier. The same problem exists in Utah County. There, such companies as Bonham Corporation of Provo (R. 744), Spanish Fork Foundry Corporation (R. 757) and the Backman Foundry at Provo (R. 767) expressed the need for adequate single line service to points north of Salt Lake City.

In hearings of this type, it is not practical to produce every interested party, but the mere logic of the situation compels the conclusion that there is and in fact has been for some time a need for this service which has increased with the industrial development of the areas. Various witnesses also expressed a concern with the need to relieve dock congestion where shipments move from Salt Lake City to various Utah points. On the surface, this appears to be a minor complaint. Their testimony when fully considered, however, shows this as a substantial problem.

The testimony of Carbon shows that the improvements requested by the shippers are easily possible with single line service between such points as Ogden and Salt Lake City, with substantial improvement in such matters as time in transit, tracing, rate reduction, and other operational matters. There can be no question that Carbon service has been satisfactory to the shipping public, and that it has the knowledge and financial ability to properly institute the proposed service.

The language of this Court in *Mulcahy v. Public Service Commission*, 101 Ut. 245, 117 P.2d 298 (1941) is pertinent. In discussing the meaning of convenience and necessity, after pointing out that these are not terms applicable to individuals but to the general public, the Court called attention to the requirement that one seg-

ment of the public is entitled to the same treatment as another segment:

“It does not mean ‘necessary’ in the ordinary sense of the term. The convenience of the public must not be circumscribed by holding the term ‘necessity’ to mean an essential requisite. It means a public need without which the public, people generally of the community, would be inconvenienced or handicapped in the pursuit of business or wholesome pleasure, or both. *It is the denial to people generally of the community, to their detriment, of that which is enjoyed by other people generally, similarly situated.*”

The Court continued:

“It is a definite need of the general public for such service where no reasonably adequate service exists. It is necessary, if it appears reasonably requisite, and is suited to and intends to promote the accommodation of the public... The statute should be so construed and applied so as to encourage rather than to retard mechanical and other improvements in appliances and in the quality of the service rendered the public; ...*and should look to the future as well as the present, providing not only for present urgent need but such as may be reasonably anticipated from the probable growth of population, industry and community development; ... to the end that both the quality and quantity of that which is offered to the public for its necessity, convenience and pleasure may be improved and increased and community development and life enriched and encouraged.*”

The second advantage in granting the Carbon application lies in the preservation of the motor carrier service which existed prior to Wasatch abandonment. In the Salt Lake-Ogden area, in essence, Carbon seeks to replace that service. Shipper after shipper discussed the advantages of two carriers, described the tonnages moved and emphasized the fact that in the past Wasatch has, in fact, handled a substantial tonnage of traffic. They expressed a desire for competition between carriers which their experience had found to be highly salutary on the service provided. It is clear that unless there is some compelling reason why only one regular route motor carrier should serve between these populous Utah cities, the application should be granted.

There is a further benefit shown by the testimony (R. 1207-1209). The proposed operation by Carbon can be handled without increased expense of any consequence, using the present Salt Lake terminal of Carbon without addition of either equipment or personnel. Carbon would be materially strengthened from a financial standpoint.

What effect would the grant of authority to Carbon have on existing carriers? The services of Ashworth Transfer Company and Salt Lake Transfer Company are not directly affected to any appreciable extent, as they are specialized on-call carriers handling basically truck load traffic only. Wycoff holds no present authority between Salt Lake and Ogden and its authority to the north is in restricted express service. The railroad

operations provide a rigid and different type of service. To a lesser but definite extent, Union Pacific Motor Freight is subject to the same operational deficiencies. It is viewed by the Commission as a service auxiliary to rail, and its authority designed to transport some of the rail lcl traffic. It cannot serve intermediate points except at rail stations and traffic must move on rail billings. The effect on all of these carriers would be negligible.

That leaves Barton. It is a typical line-haul motor carrier of general commodities. Its operating witness stated, as was to be expected, that it was necessary to preserve all traffic available, and that any grant of authority would have an adverse effect on it. These general statements have little real value. The significance of the Barton testimony is in the evidence it failed to produce. There was no operating statement, not a single financial document from which an intelligent survey of their position could be determined.

Both Wasatch and Barton served between Salt Lake City and Ogden, and Wasatch transported a substantial part of this traffic. There will be no diversion of traffic from Barton but rather a transfer of a part of the Wasatch traffic to Carbon. Even if the Carbon application were granted, Barton should show continued improvement, particularly because of the increasing industrial development in the area involved. The Carbon application does not represent any threat to the opera-

tions of Barton, and certainly its desire to act as the only motor carrier in this area and to acquire exclusively all traffic is far outweighed by the public transportation service requirements described by the witnesses.

The report of the Commission (R. 1150) is notable for its brevity, and the absence of the basis upon which it has denied the Carbon application. The one short paragraph relating to Carbon's application is grossly inadequate to determine the premise upon which the Commission denied the application (R. 1155).

The question arises as to why the Commission denied the Carbon application in the face of this record. Page 5 of the Commission report (R. 1154) refers to its Wasatch abandonment order, another proceeding, and to the claimed losses there of \$10,000 per month, largely due to the Wasatch labor contract. The purpose of the reference is not set forth, but the facts referred to may explain, and this is necessarily a matter of deduction, the thought processes by which the Commission reached its conclusion. It either decided that Carbon could not operate the authority requested without financial loss, or that to grant Carbon authority would mean that Barton would operate at a loss. It may have concluded that both carriers would operate at a loss. The difficulty is the order is not adequate to determine these matters, and this illustrates the reason this Court had repeatedly admonished the Commission to make adequate findings even though it has not yet imposed the strict necessity

of findings which are required to support the judgment or decree of a court.

As to the matter of Carbon losses if it operates the required authority, every indication of the record points to a profitable operation. Mr. Hollingworth testified in detail as to the financial aspects of the operation, and Carbon's Exhibit 11 shows that not only can the proposed operation be conducted at a profit, but that it will materially strengthen and improve its operations from a financial standpoint. As pointed out, Barton did not in any way attempt an analysis of the financial impact on it of the Carbon grant. It was content to testify as to vague generalities of no real probative value.

At page 21 of the transcript, Commissioner Bennett suggested that the records should show "that Wasatch has asked to abandon their authority." Placed in context, it is clear that the exclusive purpose of the reference was to show that upon abandonment, the shipping public would be left without service of any regular line motor carrier and therefore some authority had to be granted. No more. The reference of the order, page 51, when it refers to the Wasatch losses shows that the Commission has in fact reached into a completely separate hearing as a basis of decision. How could Carbon possibly anticipate and meet this approach when it was not apparent until after the Order was issued that financial details of another hearing might control decision here? Moreover, Carbon denies that the findings and evidence

in the Wasatch case are applicable to this proceeding. Wasatch is primarily an interstate carrier, national in scope and operating from the Atlantic to the Pacific. The factors affecting its operations are fundamentally different from those affecting either Carbon or Barton. To illustrate, Carbon could and would have shown, had it known that the other hearing was in issue, that a principal source of Wasatch difficulties was a depressed tariff structure, or that its difficulty arose from problems in coordinating its operations of Utah intrastate traffic with interstate schedules and labor contracts.

The attempted use of matters beyond those presented in the hearing and in the record, and the testimony of an entirely different case, has been criticized by this Court. In *Morris v. Public Service Commission*, supra, the Court pointed out that the Commission cannot act on its own information and that its findings must be based on evidence presented in the hearing.

If, in fact, decisions are to be based in final effect on other cases and matters not in evidence but drawn from the Commission's general beliefs, then there is no purpose in holding hearings at all. The extensive time, effort and expense of assembling and presenting evidence is a worthless gesture and waste.

In short, the Commission should be compelled to decide these hearings on the record and evidence, which, standing alone would fully sustain and indicate a grant of authority to Carbon.

POINT III

THE ORDER OF THE COMMISSION DENYING ADMISSION OF EXHIBIT 11 OF CARBON MOTORWAY, INC. WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW.

This objection is directed to the summary rejection by the Commission of Exhibit 11 (R. 529). Among other things, the purpose of the exhibit was to show the financial feasibility of operations in the event the application were granted. This is a material issue, and must be considered by the Commission. Moreover, the exhibit demonstrated the desirability, from a financial standpoint, of the single line service in the Wasatch Front. If there is any exhibit or evidence designed to translate the proposed service to practical reality, this is it. The rejection on the ground of immateriality was prejudicial error.

CONCLUSION

It is respectfully submitted that the shipping public has shown its need for additional service between Salt Lake and Ogden, and for the preservation of service formerly performed in this area by Wasatch. The order of the Commission should be set aside in the Carbon case, and the Commission directed to enter its order effecting a grant of authority as set forth in the application.

Respectfully submitted,

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